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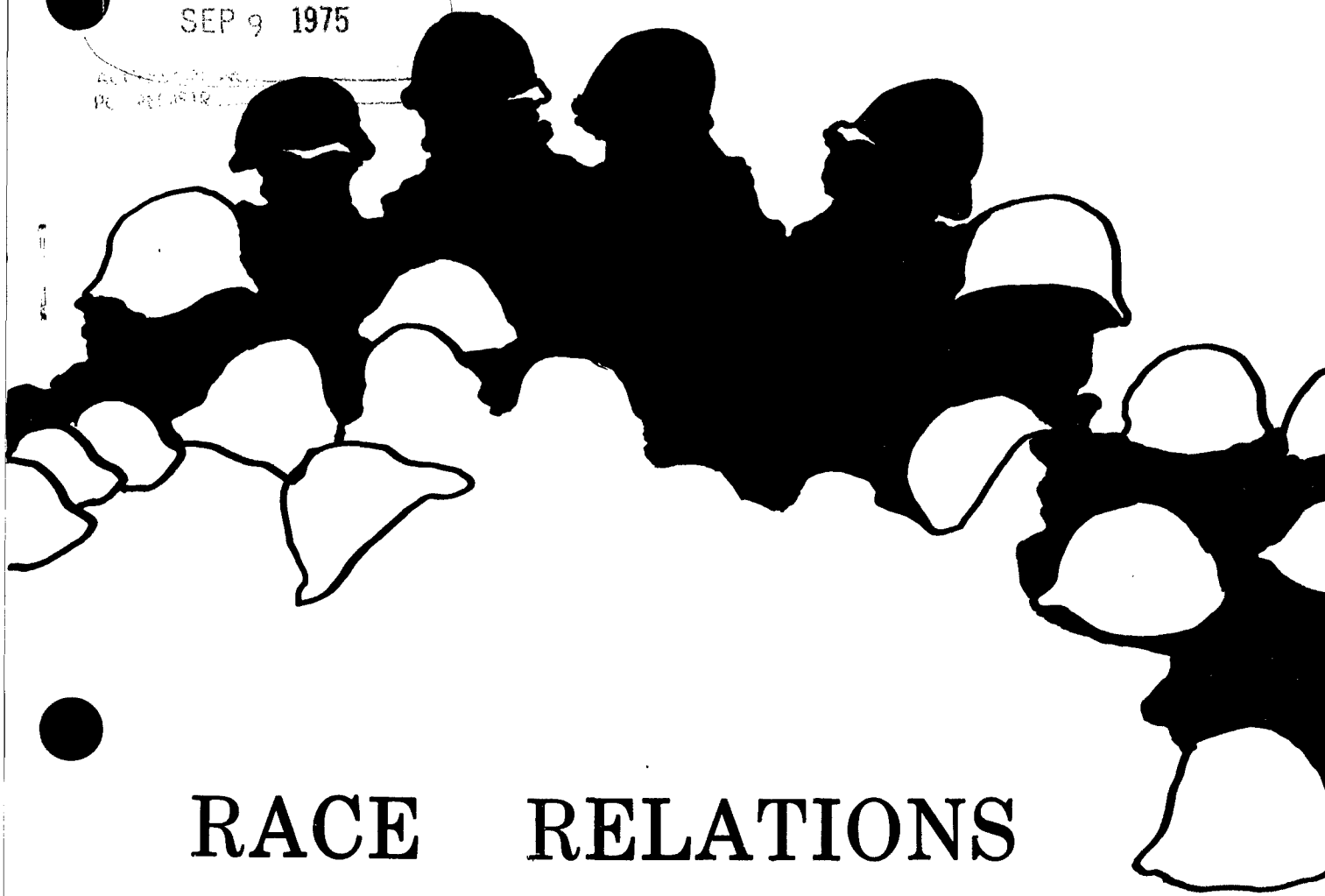
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RACE RELATIONS

EQUAL OPPORTUNITY

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**CASE STUDIES
FOR JUDGE ADVOCATES**

**RACE RELATIONS - EQUAL OPPORTUNITY
CASE STUDIES FOR JUDGE ADVOCATES**

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INTRODUCTION

Prejudice! Racism! Racial Confrontation! Equal Opportunity! These and similar terms are used freely and frequently among today's military personnel. They are more than empty words, however: they represent real problems and conditions of special significance to the staff judge advocate. With the possible exception of equal opportunity officers and inspectors general, judge advocates are probably questioned about and confronted with racial issues more than any other staff officers. Their advice and recommendations in this area are highly respected. It is imperative, therefore, that they make every effort to ensure that they are fully attuned to the problems of the Army's minority population.

The absence of overt racial hostility in a command, particularly toward the military legal system, can easily lull the staff judge advocate into a false sense of complacency. To avoid a possible misconception about the attitude of minority soldiers toward military law, the staff judge advocate and the attorneys in his office must be constantly on the alert for signs of discontent.

An important first step in the effort to avoid any aspect of discrimination in the administration of the military judicial system is to maintain a constant awareness of indicators of discriminatory practice. Records and statistics should be kept and regularly reviewed for possible indications of discrimination reflected in courts-martial, Article 15's, military police "blotters," serious incident reports, administrative discharges, drug and alcohol abuse, and legal assistance. The staff judge advocate may also decide to utilize frequent inspections and unannounced "flying squads" to scrutinize impartiality in Article 15's and other military justice actions. Of particular importance is the necessity for maintaining a continuous review of pretrial confinement, elimination boards, and nonjudicial punishment. The staff judge advocate must be prepared to take affirmative action in any situation of actual or apparent discrimination revealed by this review or through his analysis of records and statistics.

Further useful information regarding minority attitudes can be obtained from almost anyone who comes in frequent and direct contact with troops, for example,

from chaplains, doctors, commanders, military police, confinement officers, equal opportunity officers, personnel officers, Special Services officers, inspectors general, and information officers. Club custodians, noncommissioned officers, instructors, clerks, and guards may also be able to provide useful input.

The staff judge advocate can also benefit from periodic conversations with the minority lawyers and legal clerks in his own office. They, as well as the legal assistance officers, claims personnel, and counsel who deal with minority personnel on a daily basis, possess a special knowledge of the problems which often confront minority soldiers.

As in the case of most areas of professional responsibility, the amount of useful information regarding minority attitudes provided by the sources mentioned above depends directly on the degree of meaningful communication established by judge advocates. They must constantly work to improve communications, directly or indirectly, with *all* soldiers and particularly with the minority soldier who may have substantially different attitudes toward the concepts of "justice," "lawyers," and "judges."

Effective communication, of course, is a two way street. The staff judge advocate must get out the word clearly and honestly about the functions of his office and the often misunderstood system of military justice. He must also make every effort to avoid any appearance of overreaching, trickery, or of responding to inquiries or challenges in a less than candid and open manner. A "glad you asked" attitude throughout the communication process is especially important. Any progress made elsewhere will quickly be replaced by suspicion and distrust if soldiers view a judge advocate as unsympathetic, disinterested, or evasive.

The most positive antidote to mistrust on the part of troops toward the law and its practitioners is a legal system based on fairness and non-discrimination. In this regard, judge advocates must realize that perceived discrimination is just as destructive of morale and trust as real discrimination. Perceptions of unfair treatment, even though ill-founded, cannot be ignored; they must be addressed openly and honestly. Again, effective lines of communication in all directions are essential if the staff judge advocate is to successfully discover and combat

perceptions of unfairness on the part of his office and attorneys.

As a staff officer, the staff judge advocate is responsible for legal advice to his commander. However, his responsibility extends far beyond this basic requirement to render legal advice. His opinions should include his best judgment on matters of policy as well. He must act to prevent overreaction, unfair and misleading generalizations, and intemperate action. The staff judge advocate will contribute significantly to the effective functioning of the command he serves by replacing confrontation with discussion, reducing tension and anger, attenuating the periods between conflicts, and avoiding pushing anyone into a position from which he cannot gracefully retreat.

The staff judge advocate must always function on the premise that he is the representative of the law in his command; he is charged with specific duties in the administration of military justice. In this regard, he owes a duty of compliance to his command, to its troops, and to his profession. He is responsible for the execution of professional policies as enunciated by The Judge Advocate General in technical channels and by Department of the Army in Army Regulations, as well as the policies of his commander. Accordingly, the staff judge advocate must always consider his manifold responsibilities, duties, and "clients" as he employs his authority. This is essential if he is to ensure fairness and impartiality for all those he serves.

Another area of significant importance to the Corps is the current effort to recruit and properly utilize minority attorneys. The Judge Advocate General is totally committed to the recruitment of as many minority lawyers as possible, as soon as possible. This program has met with real success, but the active participation of every judge advocate is needed in this recruitment effort. Additionally, minority personnel are vitally needed and must be aggressively sought to serve as lawyers' assistants and legal clerks.

As anyone who has dealt with this particular aspect of the administration of military justice is all too well aware, there are no definitive guidelines to assist attorneys in their dealings with minority personnel. Personal experience and an honest desire to understand and meet the needs of minority soldiers are the primary

ingredients of success in this area. Neither the experience nor the desire can be adequately conveyed in any book. However, the experience of some can be recorded for the benefit of others, and an appreciation of some of the problems that have arisen and how they might be handled may provide at least some basis upon which future decisions can be made. That is the purpose of this pamphlet.

Although all of the fact situations set forth in the case studies are hypothetical, they reflect the experience of many staff judge advocates who have faced substantially the same difficult problems. The cases represent only a few of the problems. There are really no firm and concise solutions to any of them, and the discussion which follows each factual situation is not represented as "*the*" solution. It represents one approach that has proven effective in the past. It is designed to make judge advocates sensitive to some of the underlying factors that may have contributed to the problem. A useful and beneficial bibliography of race relations materials is included in the appendix to assist in locating other, more comprehensive, readings on the subject.

The loose-leaf format is utilized for maximum flexibility. It should allow the incorporation of both local and Department of the Army supplemental material. Additional case studies can also be added as appropriate. To assist in developing these, new and different situations which arise in the field should be reported to the Executive Officer, Office of The Judge Advocate General, together with an after action report, for possible incorporation into this handbook.

This publication provides the staff judge advocates with a singular opportunity to learn from the mistakes and successes of others in an area of particular concern to Department of Defense. The handbook's success is largely dependent on the willingness of individual staff judge advocates to learn from and add to its collective wisdom.

GEORGE S. PRUGH
Major General, USA
The Judge Advocate General

MINORITY PERSONNEL
IN THE STAFF JUDGE ADVOCATE OFFICE

FACT SITUATION

Colonel Taylor, the SJA at Fort Robie, has just been notified that Captain Rich Evans, a minority JA, will be assigned to his office within the next month. Colonel Taylor is in the process of determining Captain Evans' assignment. A lack of minority counsel has long been a complaint of minority soldiers at Fort Robie, and Captain Evans' assignment as defense counsel would appear to be an ideal way to ease the situation. However, two JA's from the claims section are leaving in two months, and Captain Evans would normally be assigned there. All other positions within Colonel Taylor's office which could be filled by Captain Evans are already occupied. Although it would be a change from normal office procedure, Colonel Taylor feels that Captain Evans would be most effective if assigned as a defense counsel. The position of defense counsel would also make him more visible to the community.

Colonel Taylor is also aware that minority personnel have voiced concern over the inability of white JA's to aid them in many of their legal assistance problems. The white JA's in the office have told him that minority soldiers "just won't open up." The Colonel surmises that one minority attorney may not be able to help this problem to any great extent.

SJA ACTIONS

Colonel Taylor's decisions with regard to assignment of incoming minority JA's and proper utilization of minority personnel within his office are difficult ones. No definitive guidelines can be set forth. These decisions must be based on the circumstances of each situation, the experience of the SJA, and the well-being of the attorneys involved. What follows are simply suggestions and considerations which might prove beneficial to the SJA in making these determinations.

Upon being notified that a minority JA is being assigned, the SJA might adopt the view that minority JA's should be treated like everyone else. He may well decide that there will be no favors or special treatment in his shop. Certainly no one can question the basic validity of this philosophy. The entire DOD race relations program is based on the concept of equal treatment and consideration for all military personnel. However, perhaps this particular approach overlooks some of the significant realities associated with the SJA's decisional process. Consideration might be given to the fact that there may be duties within the office of the SJA for which minority JA's are particularly well qualified. It is probable that minority attorneys will prove to be extremely effective in communicating with and counseling minority clients. Thus, a minority JA serving in the role of a defense counsel or a legal assistance officer may prove to be beneficial to both minority personnel with legal problems and the office of the SJA as a whole. The very presence of a highly visible minority JA should do much toward increasing the credibility of the military judicial process within the minds of minority soldiers. Accordingly, the SJA should consider the utilization of minority attorneys in legal assignments in which they are likely to have the most contact with minority personnel. Although it might be argued, as noted above, that this policy of duty assignment fails to follow the desired practice of "equal treatment," such an approach does serve as a realistic attempt to utilize JA's in areas of the law where they are uniquely qualified to accomplish the most good.

Another area of consideration in assigning a minority JA could be the reaction of other office personnel to the minority JA. The SJA may find his placement difficulties compounded by personnel who feel that their longevity gives them priority on new openings as well as some voice in determining whether they will be "bumped" from their present positions. Relocating a person already in the office to make room for a "newcomer" who is being placed solely because of his race could easily foster resentment and office disharmony. If the problem is properly handled, however, other office personnel may be convinced that a particular assignment for the minority JA is what they need to solve existing problems.

Regardless of the basis upon which the SJA makes his decision concerning assignments of minority JA's, it is strongly suggested that he eliminate any feeling

on the part of the incoming attorney that he is being used as "window dressing." Certainly, the assignment of minority JA's to highly visible legal positions may result in such feelings on the part of these attorneys, and there should be sensitivity to this reaction. Thus, as in all cases of assignment of duties within the SJA office, the individual preferences and desires of the minority JA should also be given great weight.

Every SJA is aware of the fact that legal assistance is one area of the law which lends itself to establishing the credibility of the military judicial system and those who administer it. However, the white JA may have difficulty in communicating with minority clients. This appears to be especially true in terms of the initial interview with minority soldiers. There may be several reasons for this. A language barrier may exist; there may be a failure on the part of the white legal officer to understand the nature and causes of problems which may be unique to minority soldiers; or the minority soldier may not be able to express himself adequately or he may not know what the legal officer is capable of doing for him. Moreover, the minority client may feel embarrassment at having to explain his situation to a member of the white majority or he may feel the "system" has once again forced him into dependency on a representative of the "white" judicial process for his well-being. For all these reasons, a minority JA may prove to be of significant value to a legal assistance program.

There may often be times when minority JA's are unavailable for work with minority legal assistance clients. In such a situation, some SJA's have utilized minority law students from nearby law schools and minority enlisted personnel and lawyers' assistants within their own offices. These individuals have proven to be valuable, especially in the initial interview stage. It is recommended that SJA's consider utilizing minority personnel in this capacity.

Only the individual SJA can best determine upon what basis to make the assignment of duties within his office. The above observations and suggestions are set forth only for his consideration. The office of the SJA must function as a cohesive unit. Proper and effective utilization of minority attorneys and other minority personnel is an integral part of this functional process.

MINORITY PERSONNEL
IN THE STAFF JUDGE ADVOCATE OFFICE

CHECKLIST

1. Consider assignment of minority JA's to duties which will put them in contact with the greatest number of troops, minority and white.
2. Consider those assignments in which minority JA's can most effectively deal with minority soldiers; *i.e.*, defense counsel and legal assistance.
3. Be sensitive to the fact that assignments based on the above considerations may result in minority attorneys feeling as if they are being "used." It is important that the minority JA feel as if his assigned role offers him the opportunity to best serve the interests of the judicial process.
4. Consider the professional and career interests of the minority JA to the fullest extent possible.
5. Be aware of the feelings of other personnel in the office and avoid resentment that may arise from what appears to be preferential treatment.
6. Consider the use of minority law students and other minority personnel and paraprofessionals in the legal assistance office, especially in connection with initial interviews of minority clients.
7. Consider the value of a broad experience base; attempt to develop the "whole" lawyer.

THE DEFENSE COUNSEL: A KEY TO COMMUNICATION

FACT SITUATION

Camp Brooks is a large basic training installation located in the southeastern United States. Due to the large number of basic trainees at Brooks, the SJA office is staffed with a large number of attorneys. Recently several of these attorneys have voiced concern over their lack of experience in counseling minority personnel. "How do you talk to those guys?" is a question often asked. One attorney from the Deep South declares: "With my accent, no black guy is going to trust me." Still another says: "Maybe we can learn their language." Several other counsel have indicated they have no problem with developing good rapport with minority soldiers, but they are concerned over whether they should pass along specific information on racial problems that has come to their attention. "Does the SJA want this sort of input?" asks one. "Is that really part of our job?"

SJA ACTIONS

The Deputy SJA has called a meeting to discuss the questions raised by these attorneys. What should he tell them? What recommendations should he make?

1. *Rapport with Minority Clients.* It is essential that the SJA impress upon defense counsel in his office that they will often encounter minority clients with backgrounds which vary greatly from those of the majority of the attorneys. Moreover, these JA's should be informed that they may be confronted with language difficulties, not only with Spanish-speaking soldiers but also with blacks who may have undergone a completely different cultural experience and, as a result, speak what is often referred to as "street" English. If this is the case, the soldier may have difficulty communicating when he or she enters upon active duty—not only with commanders and first sergeants, but also, if he gets involved with the military judicial process, with his attorney. Defense counsel must therefore develop the ability to counsel a young soldier in this situation. This is often an extremely difficult task, and the ability to communicate effectively with minority clients comes only through effort, experience, and a desire to understand and assist these individuals.

In establishing attorney-client rapport, it is essential that defense counsel be aware that differences may exist between the attitudes, values, and beliefs of white and minority soldiers. Minority personnel may react differently than whites in similar situations and may express views which are difficult for the white defense counsel either to understand or appreciate. Moreover, it is important that the attorney be aware of the fact that certain words and actions may be perceived as discriminatory. This may be due to an overly sensitive reaction on the part of the minority client. It may also be due to a poor choice of words or actions on the part of the under-sensitive attorney. Regardless, whether justified or not, "perceived discrimination" makes the attainment of the desired attorney-client relationship extremely difficult, and the white defense counsel must be informed of those words and phrases which may be viewed as racist in nature. The military has trained personnel in this area who are available for consultation.

There are no textbook guidelines which may be issued to attorneys dealing with minority personnel. Constant effort on the part of the attorney, experience, and an honest desire to understand and meet the needs of minority soldiers are the primary ingredients of success in this area. Several steps might be suggested with a view toward improving defense counsel-client rapport, however. It is advisable that defense counsel discuss these problems with attorneys experienced in counseling minority personnel in order to benefit from their knowledge. The SJA should be instrumental in assuring that these meetings occur. These experienced attorneys should then remain available to aid other defense counsel who encounter communication and credibility problems. It is also advisable that defense counsel attend, to the fullest extent possible, the race relations instruction given at their installations. This aids in giving counsel a much greater understanding of minority personnel and the often unique problems which confront them.

On occasion defense counsel is informed that the only way to establish credibility and rapport with minority clients is to "become black or brown." He may be advised to "speak their language," or "dap with the best of them." In the cases of some few individual attorneys, this approach toward minority clients may prove to be effective. For the great majority of white attorneys, however, such an approach would be personally and professionally dishonest. Behavior such as this would most probably result in a mocking distrust on the part of the minority

soldier involved. *Experience has shown that an attorney-client relationship built on frankness, honesty, and professionalism will consistently prove to be the most effective.* An honest and hard-working defense counsel will soon win a favorable reputation among minority personnel, regardless of his accent or home state.

Emphasizing the ability and willingness of defense counsel to communicate with and relate to minority soldiers cannot be overdone. These attorneys are provided with a very real opportunity to demonstrate the fairness of and establish credibility in the military judicial process.

2. *Defense Counsel as a Source of Information.* If defense attorneys are able to communicate effectively with minority soldiers and do, in fact, earn their trust and confidence, they will prove to be invaluable to the SJA as sources of advice and counsel regarding the general racial situation within the command. This is not to be interpreted as a recommendation that these attorneys be utilized as "spies" or "informers." Experience has simply shown that minority personnel with problems will often speak more frankly to their attorneys than to commanders. Moreover, as a result of changes in Article 15 requirements and other phases of military justice, more and more soldiers will have the right to see attorneys. Along with Equal Opportunity and Race Relations Officers, military lawyers are in a good position to keep authorities advised of racial difficulties which may not be readily apparent. It is suggested that the SJA advise the lawyers in his office that he desires to be kept informed of general matters of racial concern. Acting on the basis of his own experience, the SJA may then choose to pass this information on to the commanding officer.

One note of caution must be set forth. In keeping his SJA advised of racial problems of which he has become aware, the military attorney must always bear in mind the professional responsibilities and limitations of the attorney-client relationship.

The ability of defense counsel to provide timely and accurate information with regard to racial problems is much too valuable an asset to be wasted. If used correctly, it should prove to be an integral part of a progressive preventive law program.

THE DEFENSE COUNSEL: A KEY TO COMMUNICATION

CHECKLIST

A. *Rapport with Minority Clients*

1. Alert defense counsel that they may encounter clients with vastly different sociological backgrounds and language problems.
2. Advise defense counsel that a difference in minority attitudes, values, and beliefs may result in statements and actions difficult for the attorney to understand.
3. Apprise the attorney of words and phrases which may be perceived as discriminatory in nature.
4. Insure that defense counsel meet with attorneys experienced in counseling minority soldiers.
5. Have defense counsel attend race relations training, if at all possible.
6. Advise the attorney to "be himself." Honestly and professionalism are the keys to the establishment of a workable attorney-client relationship.

B. *Defense Counsel as a Source of Information*

1. Request defense counsel to keep the SJA informed of significant racial matters which come to their attention.
2. Acting on the basis of his own judgment and experience, the SJA may choose to pass this information to the commanding officer.
3. Defense counsel are not to be used as "spies" or "informers."
4. The defense counsel must act within the limitations of any attorney-client relationship which may have been established.

OVERCOMING MISTRUST OF THE MILITARY LEGAL SYSTEM

FACT SITUATION

Fort Blank is a medium-sized Army installation located in northeastern United States. Captain Brooks is assigned to Fort Blank and is the company commander of A Company. Several weeks ago Captain Brooks was informed by his first sergeant that several of the minority soldiers in the company were having financial and domestic difficulties.

When Captain Brooks suggested that the individuals seek legal assistance from the local SJA office, his men stated that they wanted to "stay as far away from that place as we can." Upon further inquiry, Captain Brooks learned that the soldiers associated lawyers and law with trouble and punishment. In discussing the matter, he found that his men were convinced that minority soldiers received "the short end of the stick" whenever they became involved with the military justice system. In addition, he learned that they viewed military justice as a tool of the command used "to keep us in line."

Captain Brooks immediately called the office of the SJA and explained the problem. Later he made an appointment with the Deputy SJA to discuss what could be done about this attitude among the minority soldiers in his company. Upon meeting the Deputy SJA, Captain Brooks asked the following questions:

"Why do many minority soldiers view the law and lawyers so disparagingly?"

"What can be done to dispel their distrust?"

"What actions can the SJA take to better inform minority personnel about the military justice system and the other legal services available to them?"

The following discussion suggests some answers to the questions posed by Captain Brooks.

SJA ACTIONS

Most judge advocates in the field are cognizant of the fact that many minority personnel are distrustful or suspicious of the fairness of the administration of military law, especially criminal and disciplinary law. From the point of view of many of these soldiers, the judicial process is considered a white man's justice, with the UCMJ written by white people to serve a white system, in language that, for the most part, only they are able to understand. Many minority soldiers are convinced that they are punished more often and more severely for the same offenses than whites. Moreover, a desire not to challenge "white authority," coupled with a lack of understanding of the military judicial process, sometimes creates a tendency on the part of minority personnel to accept their fate at the hands of the "system," for example, accepting Article 15 punishment rather than facing a court-martial.

Perhaps distrust of the military judicial system, at least by some, is to be expected. All individuals entering the Army begin their tours of service with attitudes, values, and beliefs shaped by their experience in the civilian communities from which they came. Thus, a minority soldier may very well enter the service with a preconceived notion regarding military justice, based on his knowledge of and contact with his local civilian judicial system. This feeling toward the judicial process and those who participate in it may be positive or negative. However, many minority soldiers are convinced that the institutions in which laws are formulated, the law itself, and the agencies which administer and enforce this law belong to and exist for the benefit of white Americans. Although such an attitude may be difficult for others to understand, there is some justification for its existence.

The values and behavior regarded as proper and acceptable by society's members are expressed through its legal system. This is especially true in American society, where the people themselves have so much influence in making and enforcing the law. Thus, the values implicit in these laws generally reflect the attitudes, desires, and aspirations of the majority of Americans. Many minority people believe they have been excluded from American society and from active participation in the law-making process, and this influences their attitudes toward

the law. The institutions which formulated the law, and the agencies which administered and enforced it, did reflect, for many years, almost exclusively the determinations of white citizens in America. Thus, it should not be surprising that American legal institutions are often viewed by many Americans of minority groups not as tools with which to build a better society but as weapons in the hands of persons who are, at best, indifferent to their fate and, at worst, intent on exploiting them. Even minority soldiers who have had no personal experience with the law enforcement processes often believe that the legal system exists only to "keep them in line" and recognizes them only as potential violators of its rules and regulations.

If these individuals enter the Army with this attitude toward the civilian legal system and its functionaries, they will probably view the military legal system in much the same way, as an instrument utilized by commanders to punish and discipline at will. They will tend to avoid "the system" and those who are seen to comprise it. Minority soldiers who find themselves involved in the military justice system may well view it as discriminatory and attribute their plight to racial prejudice.

It is apparent that much of this distrust of the military legal system is the result of a fundamental lack of understanding. Yet, charges of racial prejudice lodged against the legal process due to perceived discrimination and a lack of understanding are, because of their destructive effect, almost as serious as charges based on documented cases of actual discriminatory practices. In either case there is a problem, but the solutions for each will differ. Certainly where the problem is one of perception, the SJA should consider action which would effectively dissipate minority misconception and distrust. One means by which to accomplish this might well be a special program to build knowledge and trust of judge advocates and the legal services they provide. Such an educational program can be aimed at, but certainly should not be limited to, minority personnel.

This educational program might be accomplished in various ways. First of all, of course, the actions of the military lawyers must be fair and nondiscriminatory, and secondly, they must also appear to be fair and nondiscriminatory. The teaching must rest on this base. But assuming this is

done, there are some additional educational steps that help get the message of fairness across. The JA and the legal services he is able to provide ought to be highly visible to troops. For instance, JA's must visit and talk with troops in the units, advising them that they stand ready to represent them in many areas of the law other than as defense or trial attorneys in courts-martial. Minority personnel may be made aware by this and other methods that legal services are available to them in the form of legal assistance and claims. These services, if publicized, explained, and correctly organized and administered, can be of a tremendous value in establishing the credibility of the military legal system in the minds of minority soldiers. When minority personnel receive prompt and efficient aid with domestic problems, indebtedness situations, and other legal difficulties, they may be less inclined to view the legal process as existing for the sole purpose of inflicting upon them punishment and other-than-honorable discharges.

With this in mind, it is advisable that the legal assistance officer monitor the effectiveness of his program by noting the volume of minority soldiers seeking legal assistance. If a disproportionately low number of minority personnel are availing themselves of legal aid, this may indicate an unawareness that this service is available and the necessity for additional efforts to insure that its existence is made know. Additionally, without in any way compromising confidences, the legal assistance officer is usually in a good position to observe attitudes, perceptions, and conditions which are harmful or detrimental to troops and the command. The legal assistance officer can be very helpful in correcting such conditions and developing confidence in the law.

In addition to publicizing the legal services provided by JA's, the SJA should consider the development of specialized military justice instruction, aimed specifically at the E-1 through E-4 grades. This specially designed instruction could be given in addition to or in conjunction with that required by Article 137, UCMJ, and by regulation. Minority JA's serving as instructors can assist in developing rapport. In every case, explanations of nonjudicial punishment, pretrial confinement, the discretion of the commanding officer, and particularly pertinent rules and regulations must be given in terms understandable to the troops.

In presenting instruction, the differences in the military and civilian systems

of justice should be noted. One aspect of this is to explain why certain actions are offenses within the military but not within the civilian community. The young soldier ought to be told the legal "why" as well as "what" and "how."

Emphasis should be placed on the safeguards and the Army's efforts and desire to achieve fairness in the military judicial process. The soldier should be informed of the rights guaranteed him by the judicial system and how he may exercise these rights. Once he understands the manner in which the military system of jurisprudence operates and the reasons as to why it must function in this way, he should feel less threatened by or distrustful of it.

There remains still another area in which JA's may play a significant role in military judicial education aimed specifically at minority personnel. JA's are expected to participate in programs administered by race relations or equal opportunity officers. By working with individuals trained in race relations, the JA is given still another opportunity to explain how the military legal system functions and to demonstrate that it is not designed to discriminate against minority soldiers. A major benefit from such association will probable be that the JA learns of the troops' perceptions of the law. This should result in improved understanding and effectiveness on the part of the military lawyer as well as on the part of the soldiers concerned.

The SJA is urged to avail himself and his office of every opportunity to inform minority personnel of the military legal system. All of the above mentioned methods, as well as many others, are workable steps toward accomplishing the goal of establishing minority trust in both the law and military lawyers.

OVERCOMING MISTRUST OF THE MILITARY LEGAL SYSTEM

CHECKLIST

1. Examine the reasons why minority personnel may distrust the military judicial system.

2. Consider an educational program to increase trust and knowledge of military lawyers and the military legal system aimed at all soldiers but which insures that minority soldiers are included.

a. Publicize the services provided by the SJA office in the areas of legal assistance and claims.

b. Visit with troops in their areas; be visible.

c. Institute specialized instruction in military justice, explaining the differences in civilian and military justice in realistic language. When they are available, use minority JA's in this capacity.

d. Participate fully in programs administered by race relations and equal opportunity officers.

3. Keep records of the number of personnel utilizing legal assistance and note extent of use by minority personnel.

4. Be diligent to look for legal needs of troops, being mindful that the legal needs of minority personnel may differ from other soldiers.

DISCRIMINATION IN HOUSING

FACT SITUATION

With the closing of Fort Delmar, Jackson Rigney, a black staff sergeant (E-6), has had to move his family to Fort Arthur for his new assignment. Upon arrival he checked with the post housing office to find an 11-month waiting list for adequate quarters on post, so, with the assistance of the Housing Referral Office, he started looking immediately for something in the nearby civilian community. He found a seemingly nice two-bedroom duplex on the east side of town about two miles from post. Rigney made an appointment to view the duplex but upon arrival at the location, was abruptly told the house was no longer available. Rigney returned to the Housing Referral Office later in the day for further assistance in his hunt for a place to live. At that time he was told that a call had come in that morning asking that a duplex on the east side of town be listed in the housing office as it was vacant. Thinking this might be right for the Rigney's, the housing referral clerk mentioned the address—the same address Rigney had been told was unavailable earlier in the day. At this point Rigney decided something was amiss and made his suspicions known to the Housing Referral Officer. A telephone check with the realtor verified that the duplex was vacant and had been available for rent all day. Rigney, complaining of discrimination, sought immediate action by the command against the real estate agent involved.

SJA ACTIONS

What role does the SJA play in this situation? What assistance, if any, can he and the command in general give to correct the problem? What protections are available to military personnel who confront discrimination in the lease or purchase of off-post housing?

1. *Statutory Protections.* The 1968 Open Housing Act¹ proscribes discrimination based upon race, color, religion, national origin and sex in the sale or rental of housing. Exemptions are allowed for boarding houses containing four or less family units, one of which is occupied by the owner as his residence,²

and for single family homes sold or rented without the use of real estate services or publications.³ The Act also provides for action by the federal government through the Department of Housing and Urban Development,⁴ and the office of the Attorney General,⁵ and for private civil action leading to the recovery of appropriate fees and costs, actual damages, and punitive damages not to exceed \$1,000 to the successful plaintiff.⁶

The 1866 Civil Rights Act is also applicable to complaints of housing discrimination:

All citizens of the United States have the same right, in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real or purchase property.⁷

While for several years after its passage the 1866 Act was construed to protect citizens from state-supported discrimination, it is now clear that the Act grants protection from private discrimination as well.⁸ As such, even in situations falling within the exceptions provisions of the 1968 Open Housing Act mentioned above, the 1866 Act may possibly be utilized to grant limited relief to a complaint. Such relief will normally be injunctive in nature, but an action under this statute may also lead to the recovery of fees and monetary damages.⁹

2. *Army Policy.* The Department of the Army has applied the general provisions of the 1968 Open Housing Act to all its personnel through Army Regulations 600-18¹⁰ and 600-21.¹¹ The latter regulation sets forth broad guidelines in the area of equality of housing.

Off-post housing (rental or sale) . . . in the United States or abroad, is either open to all soldiers and their dependents regardless of race, color, religion, national origin and sex, or they will be placed . . . on restrictive sanction.¹²

Note specifically that this policy is inclusive whereas the 1968 Open Housing Act excludes certain categories of housing, and further, the coverage of the regulation extends to overseas as well as CONUS areas. Therefore, despite the

fact that an alleged act of discrimination may not fall within the scope of the U.S. Code, if it falls within the broader parameter of AR 600-21, the commander still has an affirmative duty to seek an end to such discrimination and to utilize restrictive sanctions as appropriate.

Army Regulation 600-18 contains more specific guidelines in the area of discrimination in off-post housing. In an attempt to aid personnel in recognizing discriminatory practices when they occur, the regulation includes a list of typical practices in the housing field:

- (1) Quotation of higher prices.
- (2) Inflation of the tenor of racial prejudice in the area.
- (3) Discouraging rental or purchase through inflating or dwelling upon poor features of the property in question.
- (4) Falsely stating that the property is no longer available.¹³

The regulation also sets forth specific procedures of command operation when a complaint of discrimination is filed.¹⁴

3. *Role of the Staff Judge Advocate.* What is the role of the SJA in applying statutory and regulatory directives to a case of purported discrimination as presented by Staff Sergeant Rigney? Initially, a JA officer may be the person to whom the complaint is communicated. He must have the ability and common sense to deal with it calmly and not jump to conclusions, make promises, etc., until all the facts from both sides are known. Immediate involvement of the Housing Referral Office and coordination with the Equal Opportunity and Treatment Office on post are essential. Remember, despite the fact that the regulation requires certain actions to be taken, those actions will never commence if the appropriate personnel and offices are not contacted and advised of the situation. It is important to insure that the complainant is made aware of his rights within both the military and civilian sections—that despite the obligation of the command to investigate, he may personally seek action by the Department

of Housing and Urban Development and the Attorney General and/or seek private redress on his own as discussed above. It is imperative that all actions be taken within the time limit prescribed by the regulation, for undue delay may cost the command its credibility with much of its minority population as well as jeopardize the rights of the complainant on the civilian side.¹⁵

Throughout any investigation commenced under Army Regulation 600-18, the SJA plays a continual advisory role to the Housing Referral Office, the investigating officer, the command, and the complainant to insure protection of the rights of the complainant and the real property owner against whom the complaint has been made. Such advice may be an essential part of any attempts by the command to gain voluntary assurances of no further discriminatory practices by the owner and will follow right through to a final legal review and comment on the report of investigation.

At its conclusion, if the investigation bears out the discrimination alleged in the complaint, the commander will impose restrictive sanctions against all properties of the owner for a minimum period of 180 days.¹⁶ This power is vested directly in the local commander himself and as such differs from the off-limits authority outlined in Army Regulation 190-24. Further, there is no leeway in either the imposition or time limits of the restrictive sanctions. The commander has no choice but to impose the sanctions when discrimination is found, and they may not be removed prior to the end of the 180-day period.¹⁷ In addition, when discrimination is verified, a copy of the report of investigation is to be forwarded to the Department of the Army, ATTN: DAPE-HRR, and to the Office of The Judge Advocate General for possible action by the Attorney General.

There is no question that full compliance with the provisions of Army Regulation 600-18 may cause hardships to real estate owners involved, and at times, limit needed housing which might have otherwise been available to military members. However, when viewing the ultimate purpose and goals behind the 1968 Open Housing Act, and Army Regulations 600-18 and 600-21, even minute and seemingly inconsequent exceptions to these expressed policies and guidelines could lead to serious deterioration of the Army's Equal Opportunity Program as a whole.

DISCRIMINATION IN HOUSING

CHECKLIST

1. Are newly assigned personnel informed of the requirements of the equal opportunity in off-post housing program prior to obtaining housing information?
2. Is there an effective equal opportunity in off-post housing information program?
3. Are community resources being used to support the equal opportunity in off-post housing information program?
4. Are housing discrimination complaints being expeditiously processed?
5. Are complainants being informed, in writing, of the results of investigations?
6. Are housing surveys being conducted periodically to obtain new listings?
7. Are restrictive sanctions being imposed immediately for a minimum of 180 days on agents found to be practicing discrimination?
8. Are the services of command representatives offered to accompany and assist applicants in their search for housing?
9. Are housing referral office and equal opportunity personnel sensitive to the problems of minority personnel?
10. Are reports of investigation processed in accordance with AR 600-18?
11. Are DOD personnel being informed of restrictive sanctions?
12. Are other military activities which are located in the same area informed of restrictive sanctions?

13. Chronology:

- a. Complaint filed:
- b. Report of inquiry initiated:
- c. Report of inquiry completed:
- d. Voluntary compliance efforts initiated:
- e. Voluntary compliance efforts completed:
- f. Statement of legal officer completed:
- g. Commander's memorandum completed:
- h. Forwarded:

DISCRIMINATION IN HOUSING

FOOTNOTES

1. Act of April 11, 1968 (PL 90-284), Title VIII, 82 Stat. 81, 42 USC 3601, *et seq.*)
2. 42 USC 3603(b)(2).
3. 42 USC 3606(b)(1).
4. 42 USC 3608-3611.
5. 42 USC 3613.
6. 42 USC 3612.
7. Act of April 9, 1866, 14 Stat. 27 (42 USC 1982).
8. Jones v. Mayer, 392 US 409 (1968); Sullivan v. Little Hunting Park, 396 US 229 (1969).
9. 28 USC 1343(4); *see* ANTIEAU, FEDERAL CIVIL RIGHTS ACTS, 1971, at 41.
10. Army Regulation 600-18, "Equal Opportunity in Off-Post Housing," 19 November 1973. *See also* DoD Inst. 1100.16, 28 February 1973.
11. Army Regulation 600-21, "Race Relations and Equal Opportunity," 26 July 1973.
12. *Id.* at para. 4b.
13. Army Regulation 600-18, *supra*, at para. 2-1c(1)-(4).

14. *Id.* at Chapter 2.

15. Note 42 USC 3610 which requires filing with HUD within 180 days of alleged discriminatory act.

16. Army Regulation 600-18, *supra*, at para. 2-2c.

17. *See* DAJA-AL 1974/4232.

DISCRIMINATION IN PUBLIC ACCOMMODATIONS

FACT SITUATION

The Top Hat is a small but active club outside the gate of Fort Webster. The club offers a membership to just about all who apply or seek entry at the door and continually encourages patronage by soldiers in the community. Sergeant First Class Jorge Montego had heard much about the food served in the club's dining room and the name bands playing there each weekend, and decided to try the place out. Upon arrival he parked his car and proceeded to the entrance where he was stopped by a doorman who asked to see his membership card. Montego stated he did not realize he needed a card, particularly since friends on post had indicated anyone could get in and they all utilized the club on a regular basis. The doorman made it quite clear that Sergeant Montego would not enter and stated: "Don't you people understand English? We've got to keep this place clean for our regular customers." Montego got the point and left. He has now raised a formal complaint of ethnic discrimination with the command at Fort Webster, claiming the club should be open to all or placed off-limits. Is his complaint valid? What are the protections afforded to minority servicemen refused service or entry to places of public accommodations? What is the role of the command and particularly the SJA in determining the presence of proscribed discrimination and insuring appropriate action to remove such whenever found?

SJA ACTIONS

The Civil Rights Act of 1964¹ outlaws discrimination based upon race, color, religion, or national origin in places of public accommodation which involve interstate commerce, or which is supported by state action. The areas defined as public accommodations in this statute include generally hotels, restaurants, gas stations, and places of entertainment. There are definite exceptions to the provisions of the statute which allow discrimination in boarding houses containing five or less rooms, one of which is occupied by the proprietor as his residence, and for strictly private clubs.² Remedial action affords protection to the complainant in the nature of injunctive relief and recovery of attorneys' fees and

costs.³ "Actions for damages are not directly authorized by the Act, but it is possible to sue under either 42 U.S.C. 1983 or 42 U.S.C. 1985(3) for damages for the denial of rights owing their existence to the Civil Rights Act of 1964."⁴ The Act also provides for suits by the Attorney General in cases where the public interest is involved.⁵

Department of the Army has promulgated Army Regulation 600-22⁶ to insure utilization of the Civil Rights Act of 1964 by its personnel. This regulation sets forth guidelines for assisting servicemen in filing complaints of discrimination with the Attorney General. Such complaints may arise through the post Equal Opportunity, Inspector General, or Legal Assistance offices and there is no question that the SJA has a direct obligation to act whenever a complaint is made.⁷ The command as a whole has a duty to investigate complaints of discrimination under Army Regulation 600-22. However, it is to be noted that the power of the commander to both investigate and take appropriate action is limited to those facilities considered to be within reasonable commuting distance of the installation,⁸ and further, to act only in those cases dealing with permanent party personnel.⁹

Even in cases where command action is precluded, however, the SJA has an affirmative duty to counsel the complainant as to actions he may take on his own to seek redress. The manner in which this counseling is done may be highly important in retaining the credibility of the command on similar issues which may arise. While the above provisions may narrow command responsibility under the Act to some degree, it is to be noted that Army Regulation 600-22 itself broadens the coverage of the Act in other aspects. Specifically, while the Civil Rights Act of 1964 has no effect in overseas areas, overseas commanders have a clear duty to enforce the policies of the Act in their commands:

The fact that the Civil Rights Act of 1964 does not provide a judicial remedy in a given case of discrimination affecting military personnel or their dependents does not relieve a commander of the responsibility affirmatively to seek equal treatment and opportunity for his men, and for their dependents, off the installation as well as on. See Army Regulation 600-21.¹⁰

It must be understood that Army Regulation 600-22 is not intended to limit

the statutory rights of any complainant, but rather, to expand and assist with the application and enforcement of such rights. There is no requirement that a complainant go through command channels prior to seeking assistance from the Attorney General or taking action for private redress on his own. However, utilization of the procedures of the regulation should give better direction to the complainant's actions and should alert the command to potential problem areas which could have a serious effect on morale and mission accomplishment.

Applying the statutory and regulatory provisions to the factual situation presented, it appears an investigation should lead to a finding of proscribed ethnic discrimination at the Top Hat. Initially, a determination must be made whether the club falls within the Civil Rights Act of 1964 at all. On its face, the club is acting as a private organization within the "private club" exception of the statute. An argument might be raised that even if the club is truly private, its discrimination falls within the "state action" provisions of the Act due to the fact that the licenses allowing it to function are issued by the state. In this regard, however, note *Moose Lodge v. Irvis*,¹¹ wherein the United States Supreme Court held mere licensing to be insufficient state action to uphold a claim of state-supported discrimination. Viewing the general activities of the club, it appears that it is not truly a private organization, but rather a public night club acting under the facade of a private club for the sole purpose of keeping out unwanted guests. Of course, there is a problem question of proof in all such cases, but a close look at the general *modus operandi*, and use of verifiers from the post, should be sufficient to give a definite answer in a relatively short period of time.

Assuming the first hurdle of the private club exception is met, does the Top Hat fall within the proscriptions of the 1964 Act? The club does have a restaurant which is principally engaged in selling food for consumption on the premises.¹² In order to meet the standard of involvement in interstate commerce required by the Act, courts have applied a substantial action test and have looked at the percentage of products utilized by the restaurant which have moved through interstate commerce.¹³ Based on the present diversity of commercial activity in the United States today, the number of restaurants not receiving a significant supply of their products from interstate commerce would have to be quite small.

The club may also fall afoul of the statute as a place of entertainment. While the use of purely local bands would possibly grant protection to the club,¹⁴ the regular presence of name bands should be sufficient to bridge the gap to involvement in interstate commerce and again bring the activities of the club within the coverage of the Act.

Once investigation has borne out the allegations of the complaint, the command has an obligation to take action to attempt to open the facility to all its personnel. Through dealings with the proprietor the command can make Army policy known and seek assurances that further discrimination will not occur. Aside from the leverage present through contact with the office of the Attorney General in cases covered by the 1964 Act, the command has leverage in its own right through Army Regulation 190-24.¹⁵ Particularly in areas where public establishments seek out and need the patronage of servicemen, referral of cases of discrimination to the local Armed Forces Disciplinary Control Board for "off-limits" actions should lead to assurances of equal treatment in most cases.

There is no question that command interest and credibility play an important part in all race relations/equal opportunity issues. Due to the key role set forth for the SJA by Army Regulation 600-22, judge advocate personnel in the field must be fully aware of and interested in assisting to expedite and insure proper and complete processing of all verified cases of prohibited discrimination in local public accommodations.

DISCRIMINATION IN PUBLIC ACCOMMODATIONS

CHECKLIST

1. Complaint received.
2. Contact with EOT and other offices designated locally for handling complaints of discrimination.
3. Insure command action proper—within commuting distance, etc.
4. Advise complainant of rights under 1964 Civil Rights Act and Army Regulation 600-22.
5. Preliminary inquiries/attempts to get voluntary assurances throughout (forwarding of initial report to Attorney General: Civil Rights Division).
6. Investigation. Advice to Investigating Officer. Review of Report of Investigation for legal sufficiency.
7. Off-limits action.
8. Forward Report of Investigation to OTJAG: Litigation, for possible action by Attorney General.

DISCRIMINATION IN PUBLIC ACCOMMODATIONS

FOOTNOTES

1. Act of July 2, 1964, PL 88-352, Title II, 78 Stat. 243, 42 USC 2000a-2000a-6; *see also* DoD Instruction 5525.2, 24 July 1964.
2. 42 USC 2000a(b)(1); 2000a(e).
3. 42 USC 2000a-3(b).
4. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS, 1971, at 175.
5. 42 USC 2000a-5.
6. Army Reg. 600-22, "Processing Requests of Military Personnel for Action by the Attorney General Under the Civil Rights Act of 1964," 4 September 1964.
7. Army Reg. 600-22, para. 4b; Army Reg. 608-50, "Legal Assistance," 22 February 1974, para. 7b.
8. Army Reg. 600-22, para. 5c(2)(b).
9. *Id.* para. 5c(2)(a).
10. *Id.* para. 13.
11. *Moose Lodge v. Iris*, 407 US 163 (1972).
12. 42 USC 2000a(b)(2).
13. *Daniel v. Paul*, 395 US 298 (1969); *see Antieau, supra* at 165.
14. *Robertson v. Johnson*, 294 F. Supp. 618 (1966).

15. Army Reg. 190-24, "Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement," 12 February 1974; *see* para. 14, AR 600-21.

ARTICLE 138: REDRESS OF WRONGS

FACT SITUATION

Company A, 7th Battalion, 31st Infantry, has a reputation for being a hardworking but troubled organization. Under its present commander, Captain Thomas Edwards, the unit outwardly maintains an air of military professionalism and pride in the accomplishment of all mission requirements. However, beneath this appearance are subtle but growing indications of unrest. While Article 15 and court-martial actions have not increased significantly overall, there has been a sharp increase in the number of black soldiers being disciplined or processed for administrative discharges.

Eight black soldiers from the 7th Battalion have now arrived at the office of the SJA, complaining of racial prejudice in the policies of Captain Edwards. They claim to be part of a newly-formed Black Soldiers' Freedom Committee. Four of the soldiers are members of Company A and claim that Captain Edwards is continually giving Article 15's to blacks for little reason, putting blacks on extra details, and trying to get blacks out of his company any way he can. The other four soldiers are members of other companies of the Battalion and indicate that Captain Edwards has a general dislike for any black soldier he encounters.

Private First Class Johnson, one of the four soldiers from Company A, indicates he personally submitted a list of grievances to Captain Edwards two weeks ago along with a request for a formal meeting with him to discuss the alleged racial prejudice in his policies. All of the soldiers who came to the SJA office were among the signers of this list, which also demanded a change in such policies to insure fair and equal treatment to all members of the command. In response, Captain Edwards indicated that *he* was in command, and that *he*, not *they*, would decide how the company would be run. Since that conversation, PFC Johnson claims that Captain Edwards has been assigning him to continual extra details around the company area, and applying constant pressure and harassment every time they meet.

Last week PFC Johnson submitted another letter to Captain Edwards complaining against these additional duties and the constant pressure aimed at him. He also alleged that Captain Edwards was out to get him because he happened to be a leader in the Freedom Committee. It is claimed that Captain Edwards' only response to this letter was to state again that his command would be run as he deemed appropriate. The entire group supports the allegations of PFC Johnson and is now demanding action against Captain Edwards and assistance in filing a formal complaint against him under the provisions of Article 138, UCMJ.

SJA ACTIONS

A JA may be called on to play either of two important roles in connection with Article 138: Assistance to the complainant or advice to the commander. In either of these roles, the JA must maintain a position of neutrality to insure proper and objective consideration of all issues in question. In no event, however, should the same JA become involved with advising both sides of an Article 138 problem.

1. *Advising the Complainant.* Article 138 and implementing policies found in Army Regulation 27-14 provide a means for soldiers to seek redress of wrongs they believe have been committed against them by their commanders. To insure procedural regularity in such complaints, the regulation sets forth requirements which must be met before any complaint is cognizable: The complainant must be an active duty serviceman who has been personally wronged by a discretionary act of his commander; he must be seeking redress which the command is capable of providing; and must submit his complaint within 90 days of the alleged wrong. (Note that the 90-day limit may be waived by the general court-martial convening authority for good cause.) The regulation also provides that where an alternative administrative or judicial remedy exists for the correction of an alleged wrong, referral to such alternative will constitute a proper measure of redress.

The complaint itself must be in writing, naming the commander (respondent) against whom it is made, setting forth all essential facts surrounding the situation, and stating that it is a complaint under Article 138. The complainant is also required to be specific in his request as to the nature of the redress or corrective

action desired. In addition, the formal complaint must indicate that redress was already requested of the respondent commander in writing, and that redress was denied.

Paragraph 8, Army Regulation 27-14, specifically provides that a complainant has a right to receive legal advice in the filing of his complaint. "Such advice will include whether, under the circumstances, an Article 138 complaint properly lies; if not, advice will be given concerning the appropriate law or regulation under which the member may proceed to obtain redress of his complaint."

Looking at the eight soldiers presently seeking assistance, it appears that only PFC Johnson meets the basic requirements set forth above. He is on active duty, and is seeking redress from recent discretionary acts of his commander which he believes wronged him. The acts complained of are not redressable through other administrative channels. Further, redress was requested directly from Captain Edwards and was denied. The remaining soldiers are not proper complainants under Article 138 despite the fact that three of them are members of Company A. The group complaint submitted by the Black Freedom Committee does not meet the standards of Article 138 and Army Regulation 27-14, as these provide a remedy for the service member who has been *personally* wronged by his commander. Only the second letter from PFC Johnson indicates an alleged personal wrong, and action under Article 138 based upon the original group petition would be improper. While these personnel may not be proper complainants, they should be advised as to other offices which may be able to assist them. In this regard, referral to both the Inspector General and the Equal Opportunity and Treatment Office would be appropriate.

2. *Advising the Command.* Once properly submitted, a formal complaint under Article 138 must be forwarded through the chain of command to the general court-martial convening authority unless it is withdrawn. Army policy encourages resolution of problem at the lowest level of command. If the battalion or brigade commander can take corrective action, it will save much time and effort on the part of the command for the complaint may be withdrawn.

Upon receipt of the complaint by the general court-martial convening

authority, if not before, the SJA usually becomes directly involved as advisor to the command in any determination regarding the validity of the complaint and corrective action to be taken thereon. As always, complete objectivity on the part of the SJA is absolutely necessary. It is understandable how any commander, from Captain Edwards on up to the general court-martial convening authority, might consider a complaint against him as a personal affront to his command ability. The SJA must overcome any initial command reaction to summarily deny the complaint, and demonstrate the necessity of an introspective look at the problem.

Investigation into the allegations made should be commenced immediately in order to answer the complaint and avoid continued confrontation. Such investigation may be formal or informal in nature, leading to a response to the complainant within a reasonable time. There is no limitation on the scope of the commander's inquiry, and the actions required will vary from case to case. Consideration of the entire situation and personalities surrounding a complaint is essential to insure a most complete and equitable solution. For example, it would be helpful to review any record of prior complaints raised in the unit involved; the overall performance of that unit; and the personnel files of both the commander and the complainant. While such information goes beyond the specific allegations of the complaint itself, it will provide the command with a full understanding of the basis of the complaint, as well as assist in the recognition of other potential problems.

There is no question that the redress of a valid complaint, resulting from a complete and objective investigation, will build credibility for the command as well as strengthen it through identification of serious leadership and morale problems. On the other hand, denial of a valid complaint due to a negative personal reaction will reflect poorly on the command, both locally and at higher headquarters when the complaint is forwarded and redress finally granted.

Those to whom an application for relief under the provisions of this Article is submitted may not lightly regard the right it confers, nor dispose of such application in a perfunctory manner.¹

In his role as advisor to the commander the SJA is in a position to assist

both in the correction of command problems and the identification of frivolous complaints. If Captain Edwards is guilty of command indiscretions through improper treatment of minority soldiers, the situation must be corrected as soon as possible. On the other hand, Captain Edwards may be a fine commander who believes in getting a full day's work out of all his soldiers. Those who do not like his policies may try to put pressure on him through complaints under Article 138. There is no way to determine the validity or frivolity of any complaint without an unbiased investigation and determination of the facts.

Article 138 must not be considered a tool of harassment for the dissenting or dissatisfied soldier which the command disposes of by a *pro forma* investigation and denial. Rather the SJA, through education and objective advice, can insure that Article 138 not only is available to all personnel, but is viewed by commanders as a way to discover and correct those abuses which occasionally mar the exercise of command discretion.

ARTICLE 138: REDRESS OF WRONGS

CHECKLIST

A. *Article 138 Requirements and Procedure*

1. Was the complainant, at the time the complaint was submitted, a member of the Army on active duty?
2. Was the respondent a commanding officer within the meaning of Article 138.
3. Was the "wrong" complained of a discretionary action by a commanding officer under color of his federal military authority?
4. Does the complaint allege that the action taken by the commanding officer was unauthorized, unfair, or discriminatory?
5. Does the complainant allege that the action taken by the commanding officer resulted in a detriment to him?
6. Is the action requested capable of redress within command channels?

B. *Advising the Complainant*

1. Advise complainant of overall rights and procedures of Article 138.
2. Determine if the grievance is a proper subject matter for complaint under Article 138.
3. Assist complainant in drafting complaint to insure procedural requirements are met.
4. If the grievance is not proper for action under Article 138, advise complainant of alternative remedies available to him.

C. *Advising the Commander*

1. Insure the commander is knowledgeable of the nature of Article 138 complaints.

2. Advise the commander of procedural requirements and alternative courses of action set forth in AR 27-14:

a. Grant or deny redress;

b. Return the complaint due to procedural errors, with specific notation as to the reason for return;

c. Forward the complaint to higher headquarters with recommendations if unable to grant redress locally;

d. When specific channels already exist for dealing with the matter set forth in the complaint, refer complainant to such channels for appropriate action.

3. Review the complaint and investigation impartially and give advice to the commander with complete objectivity.

4. Insure complainant is notified of decision of commander.

5. Advise the general court-martial convening authority that following his action he must personally forward all complaints to The Judge Advocate General.

ARTICLE 138: REDRESS OF WRONGS

FOOTNOTES

1. Tuttle v. Commanding Officer, 45 C.M.R. 3 (1972).

ETHNIC EXPRESSION

FACT SITUATION

The rise of black awareness has caused the use of various black power symbols among the soldiers of Fort Benjamin Butler. Manifestations include use of the black power salute, braided bracelets, the "dap" and braided hair. The office of the SJA has received many inquiries from unit commanders who believe these symbols and actions are increasing racial tensions in their units. The issue has been raised repeatedly in the post commander's conferences, and a proposed local regulation has been written which specifically prohibits the above activities. The SJA has been asked to comment upon the proposed regulation.

SJA ACTIONS

This situation presents a three-fold problem to the commander: he must balance the requirements of good order and discipline against the demands of minorities for self-expression, as well as the possible infringement of constitutionally protected areas of free speech or expression. The SJA can mediate these countervailing pressures on the commander not only through his advice as to the legality of orders and regulations concerning minority expressions and symbols, but also by an objective assessment of the relative merits of any contemplated courses of action.

A post commander has extensive authority to promulgate regulations governing the operation of his post and access to it. Regulations in the latter area were extensively litigated in matters of military dissent during the Vietnam War.¹ More pertinent to the immediate problem are regulations concerning appearance and uniform violations. The commander's authority derives from two regulations. Army Regulation 600-20 sets forth policy regarding the length and style of hair, and Army Regulation 670-5 governs uniforms and wearing of non-military items.² These are the starting point for the SJA's advice to the commander. Under the first regulation, braided hair has been considered an "extreme" hair style, and thus

prohibited.³ Likewise, Army Regulation 670-5 prohibits the wearing of a fad device, vogue medallion, personal talisman or amulet when in uniform or on duty. Further, items with disruptive moral or social overtones are also forbidden.

As the commander's legal adviser, the SJA must render opinions on the legal sufficiency of proposed regulations and actions. In order to do so, he must maintain close communication with race relations and equal opportunity offices. Such liaison will aid in gaining an understanding and knowledge of the racial tenor throughout the command, and allow the SJA to render his advice in the most proper perspective. When warranted, he may advise the commander to limit his reaction to racial incidents, especially when charges under the UCMJ are contemplated. He may also advise the commander of alternatives to formal legal proceedings. He must be able to consider the facts surrounding an incident objectively, the possible courses of action, legal or otherwise, and potential ramifications of each course of action.

While the SJA will be advising the command when racial problems arise, attorneys on his staff may be advising soldiers who have complaints of discrimination on the part of elements of the command itself. The attorney rendering such advice is in a delicate position, and he too must be thoroughly familiar with current racial policies and programs. He must be able to maintain an objective view of legal and racial problems and avoid undercutting the commander's legitimate authority, yet do so without appearing to be the commander's spokesman. In the case of a questionable regulation, it would be improper for the attorney to advise defiance of the regulation as an unconstitutional abridgement of freedom of expression. If the regulation is questionable, the attorney should so inform the SJA in an attempt to have it corrected. If he agrees, the SJA has a duty to inform the commander and recommend that the regulation be revised or rescinded. Promptness in taking proper legal action is, of course, essential in the correction of an illegal order or directive. For counsel to neglect this procedure and advise members of the command that the regulation is not binding will only aggravate an already tense racial atmosphere.

Whenever the military attorney is called upon and offers advice, whether he

be in the role of SJA, defense counsel, or legal assistance officer, he must be knowledgeable of and sensitive to the racial environment in the military community. The need for sound and accurate factual determinations, caution in giving advice based on hastily obtained information, and avoidance of overreaction are crucial in these situations. The SJA must maintain an objective view of all race relations issues. In some situations he may have to tell the commander that a policy is of questionable legality when the commander wants to hear the opposite.

While the Army regulations give some backing to the local regulation proposed at Fort Benjamin Butler, the SJA should be prepared to question the necessity of such a regulation. As mentioned above, some of the symbols, such as braided hair, already fall within the scope of Army regulations. As to other symbols, however, consideration must be given to the true reason behind the regulation. Is it motivated merely by a lack of understanding of the basis for such symbols and devices? A handshake between two white soldiers raises no eyebrows, but a black power salute or dap is often treated with suspicion. Recent fads such as copper or POW/MIA bracelets cause little comment, while the black soldier's braided bracelet receives command attention. The proposed regulation will be viewed with hostility by black soldiers since apparently only their actions are proscribed and nothing in it applies to white soldiers.

Regulations aimed specifically at symbols of a minority group are suspect in themselves. Further, they may only invite resistance and further irritate a sensitive situation if they are perceived as being based only on the fact that the command does not like the group to have symbols. Unless a particular symbol or activity violates Army policies or regulations which are definitely enforced equally towards all personnel, the better solution may be to ignore those symbols which do not prejudice discipline or mission accomplishment. Education as to the meaning of these symbols is appropriate to correct misapprehension on the part of those who do not understand them.

Regulations which, based on safety needs, prohibit fad devices or symbols are also appropriate. It is unsafe for a mechanic to repair a jeep engine while wearing a tassled bracelet, as it may interfere with his ability to do his job, and

lead to possible injury if caught while the machine is in operation. An item which could be used as a weapon may also be prohibited.

In summary, the SJA plays an important role in race relations. Among other duties, he evaluates the legal basis and sufficiency of regulations as well as charges and specifications. He must be able to objectively and rapidly evaluate information in order to give appropriate advice in times of racial unrest. He should not limit himself to purely legal matters but should also consider the overall necessity and advisability of a course of action. He should be aware of the ramifications of legal and non-legal actions upon minority groups, and how those groups will perceive those actions. But above all, he must insure that any actions taken by the command are both fair and impartial in appearance and fact to maintain the integrity of the command in the minds of all soldiers.

ETHNIC EXPRESSION

CHECKLIST

1. Gain complete knowledge of racial situation throughout the command.
2. Develop understanding of meanings of various ethnic symbols being used.
3. Take an active rather than passive role in area of race relations through utilization of minority personnel, discussions, etc.
4. Maintain an objective position.
5. Insure the command is aware of the legal standing on any actions proposed as well as the practical problems which may result.
6. Avoid hasty reactions which could lead to a loss of credibility with either the command, a minority group, or both.
7. Insure instructions to all personnel as to the actual workings of the Army's Equal Opportunity and Treatment Program.

ETHNIC EXPRESSION

FOOTNOTES

1. DA Pam 27-21, para. 6.13c through d, *Military Administrative Law Handbook*, (15 Oct. 1973). Army Regulation No. 210-10, *Installations Administration* (30 Sep. 1968).
2. Army Regulation No. 600-20, Figure 5-1, *Army Command Policy and Procedure* (12 June 1974). Army Regulation No. 670-5, para. 1-5, *Uniform and Insignia, Male Personnel* (8 Jan. 1971).
3. See DAJA-AL 1973-5074, wherein reference is made to the DCSPER opinion that "corn-row" braids are an extreme hair style and thus prohibited by Army Regulation No. 600-20.

USE OF ADMINISTRATIVE DISCHARGES

FACT SITUATION

Captain Brennan, commander of Company C, 1st Battalion, 78th Armor, is seeking advice regarding a serious personnel problem in his organization. One of his black soldiers, Private (E-2) Wilson, has been in continual trouble since joining the unit four months ago. Wilson was transferred to Company C from Company B, 1st Battalion, 78th Armor, where he had been assigned for five months following completion of Basic and Advanced Individual Training. During this initial five-month assignment Wilson had some problems with the command. He received one Article 15 from his company commander. He was also recommended for a second Article 15 but instead received a strong reprimand from the battalion commander. Both of these incidents related to disrespect for or disobedience of a noncommissioned officer. Following the last one Wilson was transferred to Company C. As the entire battalion is located in one building, this transfer entailed a move from the first to the third floor. Captain Brennan indicates he has tried to help Wilson but feels unable to reach him. Just after Wilson arrived in the company Brennan had a counseling session with him and realized that Wilson was very bitter about his former assignment in Company B. He felt he was continually "hassled" by his NCO's and by the commander as well, and further, that all the blacks in the unit were under pressure most of the time from the whites. Within one month of his arrival at Company C, Wilson was facing Brennan on a charge of disrespect for the company first sergeant. Brennan decided not to go with an Article 15, but did have another long talk with Wilson. Here again, Wilson was very bitter, stating that Brennan and his first sergeant were "no different than the whiteys in Company B." Just last week Brennan did administer an Article 15 to Wilson over a fight he was involved in with a white soldier in his platoon. It appears that the white soldier had used the word "boy" in conversation and Wilson got mad and started swinging. Witnesses indicated that the comment appeared not to be made in any racial sense and not directed at Wilson but that Wilson jumped right in and the fight ensued. Captain Brennan says that Wilson's work has not been below average overall but few of his NCO's can get along with him. Wilson does get along well with the other young blacks in the unit, however.

In fact, he has become somewhat of a spokesman for them. Where there never appeared to be any open racial separation in the unit before, now it seems that there has been a definite split between black and white and little, if any, social mixing. Due to Wilson's continued problems and the confrontations he has caused in the unit, Captain Brennan feels he ought to be discharged for unfitness with an undesirable discharge. What considerations will arise in your discussion with Captain Brennan to insure compliance with the law and Army policies, as well as protection of the interests of Private Wilson?

SJA ACTIONS

There are several situations which may develop where the sole goal of a commander is to rid his organization of what he feels to be a disruptive influence without complete consideration of the possible ramifications of such an act. It is too easy to assume that all will return to normal and a commander's problems will be solved as soon as one certain person is removed from the command. Sometimes the route chosen is pretrial confinement if allowed under the law, or administrative discharge, where the case fits under the regulations for discharge, or both. The idea of transfer is often discounted as "I would not give anybody my dirty laundry." Also, possibly due to dislike for the individual, the idea of anything but an undesirable discharge may be difficult to consider. In many commands where the SJA is directly involved in any decision to send a man to pretrial confinement, he can control those sometimes heated decisions that may reflect poorly on whether the command made a full considered and fair judgment when viewed at a later and cooler time. Areas of interest to the commander on this issue need not be limited to the legal basis for pretrial confinement but may be expanded to show the commander the need for expeditious action on any charges he may bring and what special requirement pretrial restraint imposes upon him for prompt action regarding those charges. It is important that the officer ordering pretrial restraint realize that his personal likes and dislikes cannot properly come into play in such decisions.

The SJA does not control a commander's decision to initiate discharge action under Chapter 13, Army Regulation 635-200. Rather, the company commander is the key in the commencement of any such action and it is he who makes the

all-important initial decision as to whether discharge for unsuitability or for unfitness is appropriate. Due to this factor, the SJA should insure that all personnel, but most especially company commanders, have an understanding of the operation of the regulation involved and an awareness of potential problems which may arise from use of administrative discharge regulations as a course of action.

There is little doubt that Private Wilson's actions fall generally within the category of unfitness at first glance. However, before such an action is commenced, the company commander should be advised to consider the case objectively and look at all the alternatives and effects of such an action. For example, it is possible that, while Wilson has committed a series of discreditable acts throughout his time in service, the continuing nature of these offenses also indicates an inability to adjust to Army life and regimentation. As such he might be more properly classified as unsuitable. A complete psychiatric examination might also be appropriate and could influence the nature of discharge.

The company commander is well advised to take a hard look at his entire unit situation when he makes the determination to recommend discharge. He ought to consider the effect Wilson's discharge will have on the other blacks in the unit. As Wilson is apparently a leader of Company C's black soldiers, it is possible that removal by discharge could place an aura of martyrdom around Wilson which in turn could lead to further alienation of this group. The discharge is only permitted under the regulation and for the reasons stated. Discriminatory use of the discharge is clearly improper. Even the appearance of discrimination or the suggestion of it must be avoided. If minority soldiers believe that there is discrimination in the discharge, including its characterization, healthy racial relationships will be severely harmed. There is no substitute for even-handed nondiscriminatory, equal treatment in procedures and in results, regardless of the race of the persons involved.

The exact effect of either an undesirable or general discharge on Wilson is uncertain but no doubt negative. With the undesirable discharge he faces the likely forfeiture of veterans' benefits as well as preclusion from some federal and state employment. While the general discharge will not have such a clear negative effect, it may hinder his ability to gain employment in the civilian market. Wilson may even be strong in his desire to be discharged for a variety of reasons. One is

that his own failures might be glossed over if his friends believed that the Army acted out of prejudice rather than justice. He may also be convinced that the type of discharge he receives will make no difference as "it will be automatically changed to honorable in six months." Such misconceptions ought to be clarified to Wilson so that he understands the effect of the discharge, and that it is difficult to change the character of a discharge. Insurance of such knowledge will tend to rebut allegations that Wilson was treated unfairly or "railroaded" out without any understanding of the effects of the action on his civilian life. In discussions between Private Wilson and either his counsel for consultation or counsel for representation, it may become apparent to the JA involved that he is not really communicating to Wilson the potential effects of the action. In such cases, it would be wise to allow Wilson to be counseled by another attorney knowledgeable in administrative discharge procedures. This is not to undercut the role or ability of the appointed counsel involved, but to insure again that the respondent has a complete review and knowledge of the exact situation facing him. Appropriate documentation of such a session to include notation of Wilson's desires, understanding, etc., through utilization of counseling forms or memoranda of record are useful to the careful counsel.

As an alternative to commencing the discharge action against Wilson at this time, the company commander might prefer to reassign him out of his command for one more try. Granted Wilson has had two chances, but note that both were within the same battalion. In such a situation it is likely that Captain Brennan knew all about Wilson's problems before he had any idea that Wilson might be joining his unit. The change to Brennan's company arguably kept Wilson in the same environment and therefore raises a question as to the usefulness of the rehabilitative transfer. (In this regard, note that paragraph 13-8, AR 635-200, requires rehabilitative transfers between special court-martial jurisdictions whenever possible.)

While a rehabilitative transfer would clearly give Private Wilson another opportunity to soldier and avoid the lengthy process involved with a discharge action per se, paragraph 1-15, AR 635-200, does provide another possible avenue of approach. Where the background surrounding a specific case indicates that discharge is warranted, but the individual is showing some indications of

rehabilitative potential, the command could proceed to convene a board in accordance with Chapter 13, AR 635-200. Having a recommendation for discharge from such a board, the discharge authority could then suspend the discharge for a period not to exceed six months. This procedure would place the individual in a probationary status and allow the Army one more look at his desire and ability to remain in service.

Considering the facts behind Wilson's problems, it seems that racial elements frequently appear. There is no question that equitable treatment among all soldiers is required of all commanders. Where an officer or noncommissioned officer improperly uses his position to harass or provoke confrontation through racial epithets, etc., corrective action must be taken. The punishment of only one side of a disciplinary problem where evidence strongly suggests wrong on both sides leads to serious charges of discriminatory treatment. If Wilson's problems are due to the situation in the command and not Wilson himself, the rehabilitative transfer should be successful immediately. If Wilson himself is, in fact, the problem he will probably be in significant trouble soon after arrival in his unit.

Through education programs, particularly for junior officers in command positions, the SJA may be able to insure that administrative discharge actions are utilized only when they are truly necessary for the service. The avoidance of even an appearance that racial motives are behind such actions is a necessity. Without a clean record of propriety in this field the command loses much of its credibility with all its soldiers. It also risks continual and justified complaints which could lead to relief from command.

USE OF ADMINISTRATIVE DISCHARGES

CHECKLIST

1. Maintain clear channels of communication at all levels.
2. Get to the essential facts in any situation of racial tension. Why did it happen? How did it come about?
3. Review the background of the command involved for indications of continued racial unrest.
4. Insure the appropriateness of proposed discharge actions:
 - a. Consider the effect on both the respondent and the command.
 - b. Consider viable alternatives to discharge.
5. Maintain a continuing education program for commanders at all levels on policies, procedures, and problems involved with administrative discharge actions.

RACIAL CONFRONTATION: A THREE PHASE APPROACH

FACT SITUATION

Camp Devine, a medium sized Army post in a midwestern state, is undergoing a high degree of racial tension. For several months there have been serious altercations between white and black troops in the NCO Club, a facility which has become predominantly black oriented. During one recent incident three black soldiers were taken into custody and placed in pretrial confinement. There has been a consistent demand by a black solidarity organization on post that the three individuals be released and all charges dropped. A march, sponsored by this organization, is now underway, and has drawn a sizeable number (100-150) of participants. There has been some property destruction, public and private, as a result of the march thus far, and the marchers appear to be becoming more unruly. As they make their way to the Post Headquarters, the CG places a call to the SJA, informs him of the march, and asks that he report to the HQ at once. What role should the SJA play in this apparently inevitable confrontation? Is his office prepared to meet this crisis? If called upon, what advice should he give? These are only some of the questions which run through his mind as the SJA makes his way to the office of the CG.

SJA ACTIONS

In dealing with this incident, the SJA must realize that there are three distinct aspects of any confrontation process. What are these? What considerations do they entail? What actions on the part of the SJA do they require?

1. *The Need for a Contingency Plan.* Although no one plan can be written to meet every racial disturbance that might occur within a given command, there does exist the need for guidelines which detail, as specifically as possible, what actions will be taken and who will take them. The responsibilities of every staff agency, including the office of the SJA, must be clearly defined. In doing so, it is important to remember that "confrontations" vary in purpose and degree. Thus, a well conceived plan must provide for responses tailored to meet various

levels of escalation and should call for reaction based on the concept of displaying as little command force as possible, whenever this is possible. For obvious reasons, the SJA should play an important role in formulating these policy guidelines.

2. *Actions During a Confrontation.* The overall role of the SJA in various types of racial confrontations should be detailed in the above mentioned contingency plan. It is recommended that he not be content to remain silent until his advice is requested. He must make himself available to his commander and provide not only advice on illegal or questionable courses of action during a confrontation, but also, assuming the existence of good rapport, advice and assistance relating to the overall handling of the disturbance.

In dealing with a racial incident, the SJA and his office must do everything within their power to get the facts. Consideration might be given to the use of several JA's at the scene of the confrontation. Acting in conjunction with the military police, these attorneys could record events as they occur. The benefit to be derived from the use of such objective fact gatherers must be weighed against the damage to the credibility of the SJA office which might result, however. There is also a possibility that specific defense counsel may play a significant role in some racial confrontations. These individuals may be able to deal effectively with a group if they address them solely in their roles as counsel to soldiers who are the cause celebre of the disturbance. Again, however, they should never be used in a capacity which would portray them as simply an extension of command authority.

It is singularly important that the CG be able to look to his SJA as being the most objective individual on his staff. With this in mind, it is recommended that the SJA not serve as spokesman for the command in a confrontation situation, unless his commander feels that the incident merits the SJA's personal contact with a particular group. This does not minimize the need for the SJA to be constantly available throughout a confrontation, however, giving both legal and non-legal advice. This guidance will be given in response to both demands or requests made by the participants in a disturbance and to inquiries by the CG as to whether he should or is legally able to take certain courses of action. Thus, the SJA must be prepared to give this advice *before* the commander issues his orders.

The individual designated to speak for the command should ordinarily be identified in the contingency plan, and alternate spokesmen should be designated. This command representative need not and perhaps should not be the CG, as he will most probably serve as the reviewing authority on any charges resulting from the confrontation. The Spokesman must be someone close to the commander, a person who has credibility and who will be instantly recognized by the troops. He must have the ability to both communicate and maintain an objective and rational attitude toward individuals who may subject him to verbal abuse and demonstrate contempt for command authority. Moreover, he must be advised that he should refrain from making promises or issuing ultimatums which are impossible to keep or enforce.

It would be impractical for the SJA to recommend that military police be kept away from a confrontation, even if it is not of a violent nature. In most cases, they are the first elements of the command on the scene. However, it is recommended that an attempt be made to handle the situation with as small a show of force as possible, with due consideration being given to the safety of other personnel and property. The tendency to over-react must be guarded against, and each individual must be treated with respect. If all efforts at negotiation fail and violence does erupt, an attempt should be made to meet the violence quickly and forcefully, but with common sense and legally correct methods of apprehension. In some instances, it might be advisable to quickly apprehend a rock-thrower in a crowd or to remove an original troublemaker from the scene, if he can be positively identified. However, the mood of the crowd might indicate that this action would only serve to encourage more violence. Moreover, if a large group of individuals is involved, it would be unwise to attempt to make a mass arrest. If some initial arrests are made, the SJA must be prepared to give advice as to whether these individuals should be placed in pretrial confinement. Consideration must again be given to the immediate effect this will have on the confrontation in progress. The pros and cons must be carefully weighed in light of all existing factors.

It is obvious that no standard policy guidelines can be recommended for use in every case of confrontation. As indicated, much will depend on the situation and the mood and actions of the individuals involved. Again, it is emphasized

that at least a general policy with regard to the amount of force to be used in various types of disturbances should be detailed in a preconceived contingency plan. An effective and legitimate use of force dictates close liaison between all elements of the command. An active and informed SJA can do much toward ensuring this desired relationship by offering both legal guidance and advice dictated by good judgment and common sense.

3. *Actions Following a Confrontation.* Some of the most difficult and critical decisions confronting an SJA involved in a racial confrontation are those he must make following the disturbance. This is especially true in light of the fact that a commander may have his own predetermined and very definite views on these matters. Initially, it is important that a complete list of grievances set forth by the participants in the incident be compiled. The command should then analyze and respond to these as quickly and as thoroughly as possible. A rapid and honest response to these requests, or perhaps demands, should do much to reduce the level of tension on post. The SJA can be instrumental in this process.

Coincidental with his involvement in preparing responses to the complaints received by the command, the SJA must advise the commander as to what disciplinary action should be taken against certain participants in the confrontation. This is critical advice. Some personnel may already be in pretrial confinement following arrest. The decision must be made as to whether these individuals should remain incarcerated and whether other identifiable participants in the disturbance should be so confined. All relevant factors must be considered.

Possibly the most difficult decisions an SJA and his office must make are those regarding the individuals to be charged and the charges to be made against them. These decisions should be based on a fundamental policy guideline. *Do not "overcharge."* There is a fundamental difference between a group of three and three hundred persons involved in a racial disturbance. In the former case, all three individuals are most probably equally involved in the incident, whereas, in the latter situation, the great majority of participants are simply going along with the crowd. It is most inadvisable to arrest 150 participants in a confrontation and charge all of these individuals with disorderly conduct. Serious consideration should be given to charging only those who have clearly been identified as engaging

in acts of assault or destruction of property.

Once the decisions have been made with regard to which individuals will be charged, the SJA must determine the types of charges to be brought against them. Consideration should be given to lowering, or at least not escalating, these charges. There would appear to be a tendency to overuse conspiracy, and charges of riot and mutiny are inadvisable in situations involving a failure to obey a lawful order or an assault. Once the charges have been made against specific individual participants in a disturbance, it is recommended that their cases be handled in as expeditious a manner as is legally and practically possible. Unnecessary prolongation of the pretrial and trial procedures often gives rise to unwarranted criticism and difficulty.

The SJS has still other considerations to make and advice to give during the trial and pretrial process. In the area of assignment of counsel, attention must be given to requests for specific JA's and the availability of these attorneys. Moreover, the SJA must ensure that his office cooperates with civilian counsel to the fullest extent possible. He must also be prepared to deal with publicity that might be generated by the trials and should give advice with regard to press releases and comments made within the command in order to ensure that these are accurate and not prejudicial. Consideration must also be given to policy guidelines regarding the presence of spectators, the press, and demonstrators at the trials. In making all of these decisions, the SJA must bear in mind the sensitive nature of the subject and the possibility that both he and his office will be subjected to unmerited criticism. This should not deter him from handling the matter in an objective and totally professional manner.

Following the return of normalcy to the post, the SJA can be instrumental in investigating the unit or units that were involved in the disturbance in order to determine its cause. Moreover, if, as a result of the incident, some individuals are punished and others are not, it is important that the troops be told why. This will do much to dispel many of the mythical and disruptive rumors always associated with a disturbance of this nature.

RACIAL CONFRONTATION: A THREE PHASE APPROACH

CHECKLIST

A. *Contingency Plan*

1. The plan must have SJA input.
2. The responsibilities of the SJA office must be specified, as well as those of every other staff agency.
3. The plan should be tailored to meet varying types of confrontations.
4. The plan must be periodically updated and distributed to all concerned.

B. *SJA Actions During a Confrontation*

1. Do not remain silent; offer legal and non-legal advice in an objective manner.
2. Gather all available facts surrounding the incident.
3. If defense counsel becomes involved, ensure he does not become an "enforcer."
4. It is recommended that the SJA not serve as the spokesman for the commander.
5. The CG, as reviewing authority, should not become directly involved, unless this is absolutely essential.
6. Ensure that the command spokesman possesses communicative skills and is informed as to what he can and cannot do.

7. Recommend as small a show of force as possible; do not overreact.
8. Arrest only those engaged in destruction of property or acts of assault and only if this will not further exacerbate the situation.
9. Make no "mass" arrests.
10. Carefully consider the ramifications of placing certain individuals in pretrial confinement.

C. *Actions Following a Confrontation*

1. Charge only those who can clearly be identified as engaging in destruction acts or assaults.
2. Place individuals charged after the confrontation in pretrial confinement only when absolutely necessary.
3. Do not "overcharge."
4. Handle all cases as expeditiously as possible.
5. Carefully consider and respond to all requests for specific counsel.
6. Cooperate fully with civilian counsel.
7. Review press releases.
8. Set up policy guidelines for spectator behavior at trials.
9. Aid in investigating causes for the confrontation.
10. Stand ready to explain the actions of the SJA office to the troops.

It cannot be overemphasized that the goal of the SJA should be the prevention

of any form of racial confrontation. However, if such an incident does occur, the three phase approach discussed above should provide the basis for responsible and well-reasoned reaction.

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